Supreme Court, U.S.
FILED
APR 10 1991
OFFICE OF THE CLERK

90-1564
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

ESTATE THOMAS MALL, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 48 U.S.C. Section 1612(b), as amended, *ex proprio vigore* divest the District Court of the Virgin Islands of jurisdiction over local Forcible Entry and Detainer (F.E.D.) actions?

PARTIES TO THE PROCEEDINGS

Petitioner and Appellee/cross-appellant below, TERRITORIAL COURT OF THE VIRGIN ISLANDS, is a court of record established in 1977 pursuant to 48 U.S.C. Section 1611. See 4 V.I.C. Section 2. Respondent, ESTATE THOMAS MALL, INC., was Appellant/cross-appellee below and is Petitioner's landlord with respect to the premises leased by Petitioner for the conduct of its Juvenile Delinquency Prevention and Pre-trial Intervention Program, which premises are the subject of the F.E.D. action giving rise to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, TERRITORIAL COURT OF THE VIRGIN ISLANDS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on January 11, 1991.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 923 F.2d 258 (3rd Cir. 1991), and is reprinted in the Appendix hereto ("App.") at 1a. The Memorandum Opinion of the District Court of the Virgin Islands (Farnan, J.) has not been reported to date but is reprinted at App. 17a. The Final Order of the District Court of the Virgin Islands has not been reported to date but is reprinted at App. 24a.

JURISDICTION

Respondent filed an action against Petitioner for Forcible Entry and Detainer on June 14, 1990 in the District Court of the Virgin Islands. On June 29, 1990 Petitioner moved to dismiss for, among other things, lack of subject matter jurisdiction. The District Court entered its Final Order on August 31, 1990 in which it denied the Motion to Dismiss and denied the F.E.D. petition on the condition that Petitioner pay all withheld rent by September 14, 1990, failing which Respondent could take possession of the premises on October 1, 1990. App. 24a. Thereafter, on September 6, 1990 the Court filed its Memorandum Opinion. Petitioner appealed and on January 11, 1991, the Court of Appeals held that the District Court had subject matter jurisdiction but reversed and remanded the case with intsructions to the District Court to Dismiss the Complaint on other grounds. On February 1, 1991, Petitioner filed a Petition for Rehearing of the issue of the District Court's subject matter jurisdiction. On February 22, 1991 the Third Circuit denied the Petition for Rehearing. The jurisdiction of this Court to review the Judgment of the Third Circuit is based upon 28 U.S.C. Section 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions pertinent to this case include Article IV, Section 3, Clause 2 of the United States Constitution; Section 22 of the Revised Organic Act of 1954, as amended, 48 U.S.C. Section 1612; Section 76 of Title 4 of the Virgin Islands Code and Section 782 of Title 28 of the Virgin Islands Code. These provisions are set forth at App. 28a.

STATEMENT OF THE CASE

This petition for Writ of Certiorari involves the refusal of the Federal Judiciary in the Virgin Islands to comply with the 1984 Congressional enactment granting

increased judicial autonomy to the Government of the United States Virgin Islands.

In 1984 Congress enacted P.L. 98-454 which significantly amended the Revised Organic Act of the Virgin Islands codified at 48 U.S.C. Section 1541 et seq. In so doing, Congress stated that it intended to "abolish the concurrent jurisdiction of the District Court over causes based on local law [if] local law has vested jurisdiction over such causes in the local court." 130 Cong. Rec. S 10527 (August 10, 1984). In 1984 and prior thereto, jurisdiction over Forcible Entry and Detainer (F.E.D.) actions which are purely local in nature was vested in the local Territorial Court by the local Legislature. See 28 V.I.C. Section 782.

Despite the unequivocal statement of Congressional intent in amending the Revised Organic Act, Respondent filed in the Federal District Court of the Virgin Islands an action for Forcible Entry and Detainer against Petitioner on June 14, 1990. Petitioner moved to dismiss the action for, among other things, lack of subject matter jurisdiction. From the inception, Petitioner has contended that pursuant to 48 U.S.C. Section 1612(b), as amended, the District Court lacks jurisdiction over F.E.D. actions since such actions were within the rubric of those cases "then vested by local law in the local courts" thereby depriving the District Court of jurisdiction over them.

In its Memorandum Opinion, the District Court, without addressing any of Petitioner's arguments, merely concluded that it had concurrent jurisdiction pursuant to 28 V.I.C. Section 782(b), an anachronistic local law that was repealed by implication by P.L. 98-454. Indeed, the Third Circuit stated that the Virgin Islands Legislature has no power to grant jurisdiction to the District Court. App. 7a.

The Territorial Court filed a Notice of Appeal on September 11, 1990. On January 11, 1991, the Third Cir-

cuit affirmed the District Court's exercise of subject matter jurisdiction while reversing with instructions to dismiss the action on other grounds. The Third Circuit held that the phrase "then vested" in 48 U.S.C. Section 1612(b) means "hereafter vested" and as such the statute did not *ex proprio vigore* divest the District Court of jurisdiction over F.E.D. actions. According to the court "such divestment will not occur until the Virgin Islands legislature enacts a law which effects the power created by the 1984 Amendments." App. 13a.

On February 1, 1991, the Territorial Court filed a petition for rehearing of the portion of the decision holding that the District Court had subject matter jurisdiction over the F.E.D. action. In its petition for rehearing, the Territorial Court contended that the phrase "then vested" includes both cases "already vested" and those "hereafter vested" and that these definitions were not mutually exclusive of each other. In support of this contention petitioner relied upon the plain meaning of the phrase and the legislative history of the 1984 amendments to 48 U.S.C. Section 1612(b). On February 22, 1991, the Third Circuit denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of first impression regarding the judicial autonomy of the Territorial Court of the Virgin Islands to hear and decide purely local causes of action as mandated by Congress. The resolution of this issue, however, is of broader significance inasmuch as it will affect the autonomy and stature of the entire Virgin Islands Government. The Territorial Court has pursued this litigation primarily because of the apparent reluctance of the Federal Judiciary to obey the unambiguous command of Congress that upon the effective date of P.L. 98-454, the District Court would be prohibited from exercising jurisdiction over local causes of action if local law has vested such jurisdiction in the local court, i.e. Territorial Court.

The District Court's decision that it has subject matter jurisdiction over the case at bar and the Third Circuit's affirmance of that decision undermines the will of Congress and threatens the integrity and autonomy of the Territorial Judiciary in particular and the Territorial Government in general. Accordingly, it should not be permitted to stand.

In concluding that the District Court had subject matter jurisdiction, the Third Circuit violated time honored rules of statutory construction and relied on mere speculation as regards the potential Federal Court disruption if Petitioner's contentions were accepted. Such speculation was contrary to existing statistics and totally unsupportable by any evidence in the record.

I. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT 48 U.S.C. SECTION 1612(b), AS AMENDED, DID NOT *EX PROPRIO VIGORE* DIVEST THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OVER LOCAL FORCIBLE ENTRY AND DETAINER (F.E.D.) ACTIONS.

In 1984 Congress enacted P.L. 98-454 which eliminated the District Court's concurrent jurisdiction over local matters where local law had vested jurisdiction in the local courts. This comprehensive amendment to the Act vitiated those provisions of local law which had heretofore vested in the District Court of the Virgin Islands concurrent jurisdiction over purely local matters. The specific provision of P.L. 98-454 which contained this progressive step for the people of the Virgin Islands is Section 22(b) 48 U.S.C. Section 1612(b)), which provides in pertinent part:

> . . . The District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands *the jurisdiction over which is not then vested by local law* [1] *in the local courts of the Virgin Islands . . . Emphasis supplied.*

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[1] At the time of enactment of P.L. 98-454, the Virgin Islands' Legislature had already vested original jurisdiction over F.E.D.

The Congressional Record verifies the elimination of concurrent jurisdiction. Specifically, in enacting P.L. 98-454, the U.S. Senate stated that,[2] among other things,

> . . . this bill would *abolish the concurrent jurisdiction of the District Court over causes based on local law*, of [sic] local law has vested jurisdiction over them in the local courts. See Section 22(b).
>
> . . .
>
> The purpose of Section 22(b) is to *eliminate the present situation of both the District Court and the local court having jurisdiction over strictly local causes.* Upon the effective date the *District Court will not [sic] longer have jurisdiction over any cause over which local law has vested jurisdiction in the local courts* . . .
>
> . . .
>
> . . . by vesting jurisdiction in the local courts, the local law will have the effect of *divesting the District Court of jurisdiction. Emphasis supplied.*

The foregoing statutory language and accompanying Legislative History clearly warrant the conclusion that 48

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actions in the local court pursuant to 28 V.I.C. Section 782 which provides as follows:

> *Action for Forcible Entry and Detainer*
>
> "(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.
>
> (b) If the unpaid rent or the value of the real property involved does not exceed $500, exclusive of interest and costs, the municipal court shall have exclusive jurisdiction of such action. In all other cases, the municipal court and the district court shall have concurrent jurisdiction."

[2] 130 Cong. Rec. S 10527 (August 10, 1984).

U.S.C. Section 1612(b), as amended, *ex proprio vigore*[3] divested the District Court of concurrent jurisdiction over F.E.D. actions because jurisdiction over such actions were already ("then") vested by local law, i.e. 28 V.I.C. Section 782(b), in the local court.

In the face of this clear statement of the law and its accompanying legislative history, the Third Circuit nonetheless concluded that "there is nothing in the language of Section 1612(b) that suggests that Congress intended to divest the District Court of jurisdiction over local action immediately." App. 11a-12a. Based upon this conclusion, the Court held that "Section 1612(b) does not *ex proprio vigore* divest the District Court of jurisdiction over local matters." App. 13a. The Third Circuit's construction of the statute can only be considered as an attempt to obfuscate its plain meaning and legislative history relative to F.E.D. actions. This construction is clearly erroneous because it would require the local Legislature to do what it had already done in 28 V.I.C. Section 782(b), i.e. vest original jurisdiction over F.E.D. actions in the local court.

It is settled that "courts created by statute can have no jurisdiction but such as the statute confers." *Chris-*

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[3] *Ex proprio vigore* means "by its own force." Black's Law Dictionary 522 (Special 5th Ed. 1979). It essentially refers to the general principle that some constitutional provisions are self-executing. Provisions that are not self-executing require legislation to effectuate their purposes. See *Groves* v. *Slaughter*, 40 U.S. 449 (1841). Thus, where constitutional provisions are in issue, it must be determined whether they apply "by their own force" or whether they are subject to triggering legislation. The Revised Organic Act of the Virgin Islands, as amended, is the Constitution of the Virgin Islands (U.S. Const., Art. 4, Sec. 3), thus the Third Circuit's consideration of the applicability of the principle of *ex proprio vigore* was proper. Such as analysis however, establishes beyond doubt that the District Court was not granted jurisdiction over the F.E.D. case at bar by Congress. What Congress did not grant, the District Court does not have, thus the congressional prohibition in 48 U.S.C. Section 1612(b) with respect to F.E.D. actions applied *ex proprio vigore*.

tianson v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178 (1988)). Indeed, "a court may not in any case, even in the interest of justice extend its jurisdiction where none exists." 108 S.Ct. at 2178. By holding that 48 U.S.C. Section 1612(b), as amended, does not *ex proprio vigore* divest the District Court of jurisdiction over local matters, the Third Circuit in effect violated the holding in *Christianson* by impermissibly extending the District Court's jurisdiction over F.E.D. actions where none existed in the statute in question.

It is clear that, with respect to F.E.D. actions, the phrase "then vested" in section 1612(b) means "already vested." Accordingly, the Writ should be granted to correct the erroneous conclusion of the Third Circuit to the contrary.

II. THE PHRASE "THEN VESTED" AS USED IN 48 U.S.C. SECTION 1612(b), AS AMENDED, INCLUDES CASES "ALREADY VESTED" IN ITS CONSTRUCTION.

In affirming the District Court's exercise of subject matter jurisdiction, the Third Circuit ruled that the phrase "then vested" as used in 48 U.S.C. Section 1612 (b) means "hereafter vested," instead of "already vested." While this ruling was clearly erroneous as noted heretofore, assuming, *arguendo*, its correctness, it is submitted that also included in the phrase are cases "already" vested.

Petitioner submits that the terms "already vested" and "hereafter vested" are not mutually exclusive and that both may be included in the statutory construction of the phrase "then vested."

If this critical portion of the Court's decision is permitted to stand, the result would be the continued denial of exclusive jurisdiction in the Territorial Court over F.E.D. actions. Additionally, the District Court will be seen to be undermining the expanded autonomy of the local judiciary, contrary to Congressional intent and policy.

The Third Circuit's decision that the District Court had subject matter jurisdiction over the F.E.D. action at bar is based upon its conclusion that 48 U.S.C. Section 1612(b), as amended, takes effect only when the Virgin Islands Legislature, after the date of the 1984 Amendment to the Revised Organic Act, "passes a law which vests jurisdiction over local actions in local courts." App. 11a. According to the Court, the phrase "then vested" as used in Section 1612(b) could mean either "already vested" or "hereafter vested". App. 5a, 6a. The Court found the latter meaning to be correct, but did not consider the possibility of both being included in the construction of the phrase "then vested." It is respectfully submitted that because the Court's finding was limited to an either/or analysis, the Writ should be granted to allow consideration of the theory that both terms may be included, as explained below.

Congress was aware that the Virgin Islands Legislature had vested jurisdiction over certain local actions in the local courts prior to the enactment of the 1984 Amendments to the Revised Organic Act. It was also aware that the jurisdiction over certain other local causes was not vested by the Virgin Islands Legislature in the local courts at the time of the 1984 Amendments. Thus, it is apparent that Congress was dealing with both situations when it used the phrase "then vested," i.e. (1) immediate divestment where jurisdiction was already vested in local courts and (2) subsequent divestment where jurisdiction was not already vested in local courts.

As to the local causes which were already vested by local law in the local courts at the time of the Amendments, Congress could not have intended for the Virgin Islands Legislature to re-pass those laws that were already on the books, e.g., those dealing with the Territorial Court's original jurisdiction over F.E.D. actions. Yet to exclude "already vested" from the phrase "then vested" would lead to precisely such an absurd result

which, according to this Court, must be avoided in construing statutes. *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482, 486-487 (1868).

In the case at bar, on the effective date of the 1984 Amendment the Virgin Islands Legislature had already vested original jurisdiction in the Territorial Court over F.E.D. actions, regardless of the amount in controversy or the value of the property. 28 V.I.C. Section 782(b). Clearly, there is no need to re-enact those F.E.D. provisions. Thus, the possible increase in civil jurisdiction which may become effective in October 1991 [4] would not add any jurisdiction over F.E.D. actions in the Territorial Court. Accordingly, the phrase "then vested" must include "already vested" as it relates to F.E.D. actions.

Moreover, this interpretation is consistent with Congress' express intention to "abolish the *concurrent* jurisdiction of the District Court over causes based on local law [i]f local law *has vested* jurisdiction over them in the local courts." 130 Cong. Rec. S10527 (August 10, 1984). According to Congress, "upon the effective date, the District Court will not [sic] longer have jurisdiction over any cause over which local law *has vested* jurisdiction in the local courts." *Id.* The Third Circuit adopted the view that the phrase "upon the effective date" means "upon the effective date of an Act by the Virgin Islands Legislature divesting the District Court of jurisdiction." App. 8a. However, this reading is clearly contrary to the effective date set forth by Congress in the legislation. Specifically, Section 1005 of P.L. 89-454 provides in pertinent part:

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[4] On August 29, 1990, the Virgin Islands' Legislature enacted Act No. 5594 which amends 4 V.I.C. Section 76(a) to vest in the Territorial Court, effective October 1, 1991, jurisdiction over all civil actions regardless of the amount in controversy. Postponement of the October 1991 effective date is under consideration by the Judiciary Committee of the Virgin Islands' Legislature pending construction of the new Territorial Courthouse.

> Title *VII*, . . . [. . . amending sections . . . 1561,, 1611, *1612*, 1613, 1614, 1615, 1617 . . .] *shall become effective on the ninetieth day following their enactment* [October 5, 1984]. *Emphasis supplied.*

Title VII of P.L. 98-454 deals with the Virgin Islands. The effective date of 48 U.S.C. Section 1612(b) is thus a matter of unambiguously stated law.[5] Given Congress' intent "to eliminate the *present situation* of *both* the District Court and the local court having jurisdiction over strictly local causes," it is obvious that Congress intended that upon the effective date of the Amendments, the District Court would be automatically divested, *ex proprio vigore*, of concurrent jurisdiction over those local causes jurisdiction over which "has [already been] vested" by local law in the local courts, i.e., F.E.D. actions. 28 V.I.C. Section 782(b).

Further, in setting forth the reasons for P.L. 98-454, Congress stated:

> ". . . this bill would abolish the concurrent jurisdiction of the District Court over causes based on local law if [sic] local law *has vested* jurisdiction over them in the local courts. See Section 22b. *Emphasis supplied.*

130 Cong. Rec. S.10527 (August 10, 1984).

Again, the use of the past tense by Congress is indicative of an intent to abolish the District Court's jurisdiction over purely local actions upon the effective date of the amendment if those matters were "already vested" by local law in the local courts.

It is settled that Federal Statutes cannot be interpreted to negate their own stated purposes. *New York State Department of Social Services* v. *Dublino*, 93 S.Ct. 2507,

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[5] See, also Section 703(b) of P.L. 98-454 which ensures against the "loss of jurisdiction by the District Court over any complaint or proceeding pending in it on the date preceeding the *effective date of this amendatory Act.*" *Emphasis supplied.*

413 U.S. 405, 37 L.Ed.2d 688 (1973). Moreover, where the statutory language and legislative history clearly indicate the purpose of Congress, that purpose must be upheld. *Hudson Distributors, Inc.* v. *Eli Lilly and Company*, 84 S.Ct. 1273, 377 U.S. 386, 12 L.Ed.2d 394 (1964). Clearly, when considered in light of the foregoing holdings of this Court, the Third Circuit's interpretation of the phrase "then vested" not only negates the stated purpose of 48 U.S.C. Section 1612(b) but it also fails to uphold the stated purpose of the statute as set forth in its legislative history. Accordingly, the Third Circuit's interpretation must be rejected.

In support of its conclusion that the phrase "then vested" means "hereafter vested," the Court relies upon the following portion of the legislative history of Section 1612(b):

> The decision as to whether jurisdiction over strictly local causes should be vested in the District Court or the local courts will be made by local law.

130 Cong. Rec. S.10527 (August 10, 1984).

According to the Court, "this portion of the legislative history contemplates that the Virgin Islands Legislature will have to take some action in the future which divests the District Court of jurisdiction over local matters." App. 11a.

This portion of the legislative history obviously deals with those cases "not already vested" by local law in the local court and could not reasonably be deemed to apply to the cases "already vested." Moreover, the phrase must be viewed in the context of the entire paragraph in which it appears and the entire legislative history of Section 1612(b). At the beginning of the paragraph in which it appears, Congress clearly expressed its intention to "eliminate the present situation of *both* the District Court and the local court having jurisdiction over strictly local causes." The next sentence in the paragraph, which also

immediately precedes the provision relied upon by the Court, prohibits the District Court from exercising "jurisdiction over any cause over which local law *has vested* jurisdiction in the local courts" upon the effective date. When viewed in this context, it is clear that the phrase "then vested" must be construed to include "already vested," thereby establishing beyond doubt that the District Court had no jurisdiction over F.E.D. actions since the effective date of the Amendment.

The Third Circuit's reliance on this Section of the statute's legislative history is contrary to this Court's holding in *Richards* v. *United States*, 82 S.Ct. 585, 369 U.S.1., 7 L.Ed.2d 492 (1962). In *Richards*, this Court held that a section of a statute should not be read in isolation from the context of the whole act, and in interpreting legislation, [this] Court must not be guided by a single sentence, but should look to provisions of the whole law and to its object and policy. When viewed in light of this holding, the Third Circuit's interpretation based as it is upon an isolated section of the legislative history is contrary to the holding of this Court and must therefore be rejected.

Moreover, as was stated by then Circuit Judge Anthony M. Kennedy in his dissenting opinion in *Agana Bay Development Company Ltd.* v. *Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976):

> ". . . [t]he Organic Act must be construed to give force and effect to all its provisions and no language should be taken out of context and construed without reference to the whole territorial system established by Congress."

Id. at 959, citing *Carter* v. *Gear* (197 U.S. 348, 25 S.Ct. 491, 49 L.Ed. 787 (1905). It is respectfully submitted that if full force and effect are given to all the statutory and historical language of 48 U.S.C. Section 1612(b), the phrase "then vested" would include the term "already vested."

The Third Circuit's further reliance on *Agana Bay Development Company, Ltd.* v. *Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976) to limit the construction of the phrase "then vested" to mean "hereafter vested" does not preclude inclusion of "already vested" within the meaning of the phrase.

First, *Agana Bay* is not on point regarding the issue of *ex proprio vigore* since it was undisputed in *Agana Bay* that legislation was needed to create the Supreme Court and divest the District Court of Appellate jurisdiction. Second, the issue in *Agana Bay* was not the meaning of the phrase "has not been transferred." Thus, any reference in that case to the phrase "has not been transferred" was strictly "*obiter dictum.*" Indeed, there was no analysis of that phrase and its effective date. Third, the Court did not consider the inclusion of the term "already vested" in the statutory construction of the phrase. Thus, the Third Circuit's reliance on *Agana Bay* is misplaced.

Moreover, the Third Circuit has admitted that Congress drafted the divestiture provision in a way that could suggest that the divestiture was immediate and, that both the Guam and Virgin Islands' provisions contain grammatical inferences which could be construed to mean that divestiture was complete upon the effective date of the Amendments. App. 12a.

It is a well-settled rule of statutory construction that the legislature must be presumed to have used words in their known and ordinary significance. *See, Kramer* v. *Government of the V.I.*, 8 V.I. 449, 453 F.2d 1246, 1247 (3rd. Cir. 1971). Moreover, it is an established canon of statutory construction that all the provisions on a subject are to be harmonized and read together so as to effectuate the purposes of the statute. *Port Construction Co.* v. *Government of the V.I.*, 5 V.I., 549, 359 F.2d 663 (3rd Cir. 1966).

Had the Third Circuit given consideration to the inclusion of "already vested" in its construction of the phrase "then vested," it would have discovered that one term is not necessarily exclusive of the other. Indeed, the Court would have realized that Congress intended to immediately divest the District Court of those local causes which had already been vested by local law in the local courts, while at the same time requiring subsequent legislation to divest the District Court of jurisdiction over those local causes which had not yet been vested by local law in the local court. These objectives are not contradictory. We submit that such an interpretation would avoid the need for the re-passing of legislation that is already on the books and would be justice to the intent and policy of Congress to grant more autonomy to the local judiciary. Indeed, the Court should adopt this interpretation because it is in harmony with the declared purpose of Congress to "give a greater degree of autonomy, economic as well as political, to the people of the Virgin Islands." 48 U.S.C. Section 1541 et seq. *See*, also *In Re Petition of the Finance Committee, etc.*, 242 F.2d 902, 903 (3rd Cir. 1957).

Accordingly, Petitioner urges this Court to grant the Writ in order to review that portion of the Third Circuit's decision holding that the phrase "then vested" as used in 48 U.S.C. Section 1612(b), as amended, is limited to cases "hereafter vested" to the exclusion of those "already vested."

III. THE INCLUSION OF CASES "ALREADY VESTED" IN THE CONSTRUCTION OF SECTION 1612(b), AS AMENDED, WOULD NOT THROW CIVIL ACTIONS IN THE DISTRICT COURT INTO "CONFUSION."

According to the Third Circuit, "if we were to accept the Territorial Court's construction of Section 1612(b), as amended, at this late date, we would throw into confusion hundreds or even thousands of civil actions that

the District Court has processed the last six years." App. 14. While Petitioner is appreciative of the Third Circuit's concern for the status of the District Court and its cases, its fear is unfounded.

It is respectfully submitted that there is no basis for such a conclusion, which appears to be based on mere speculation instead of emprical evidence. In fact, very few, if any, cases would be affected if the Petitioner's contention is accepted.

On September 9, 1976 Act No. 3876, codified at 4 V.I. Section 71, *et seq.*, created the Territorial Court to replace the former Municipal Court in the Virgin Islands. In so doing, the Act, which became effective January 1, 1977, increased the civil jurisdiction to $200,000, instead of the former $50,000. Ever since the Territorial Court was created, it has been the policy of the District Court to decline entertaining those civil cases in which the amount in controversy was $200,000 or less, except for judicial economy.

This was the policy adopted by both former Chief Judges of the District Court, Honorable Almeric Christian and the late Honorable David O'Brien. In enforcing the policy, the Clerk of the District Court was required to maintain on each civil file a listing of the amount stated in the *ad damnum* clause of all complaints, and subject to the aforesaid exceptions, all cases demanding judgment of $200,000 or less were transferred to the Territorial Court for disposition.

In addition, on June 20, 1986 the Virgin Islands Legislature enacted Act No. 5176 which prohibited the pleading of a specific sum in the *ad damnum* clause of a civil complaint. 5 V.I.C. Section 5. However, the complaint was required to contain a statement that the "damages are within the jurisdictional limits of the Court to which the pleading is addressed." This certification by the attorney that the complaint was within the jurisdiction of

the District Court creates at least a rebuttable presumption that the 1984 Amendment was being complied with. Thus, with the District Court being divested of jurisdiction over civil cases of $200,000 or less in 1984, the certification leads to the reasonable inference that the damages sought exceeded $200,000 thereby eliminating any major concern about subject matter jurisdiction. With the enactment of this legislation, the District Court ceased keeping a record of civil filings based on the amount in controversy since it was no longer stated in the complaint. However, both judges continued to make a determination at pretrial conferences if the amount in controversy was $200,000 or less and if so, to transfer those cases to the Territorial Court. Very few cases were transferred because very few, if any, civil cases seeking less than $200,000 were filed in the District Court. Thus, a decision by the Third Circuit to include the term "already vested" in the construction of the phrase "then vested" would have little or no effect on the workload of the District Court, [6] until October 1, 1991 when its workload will be reduced because of the increased jurisdiction in the Territorial Court beyond the $200,000 limit.

In light of the foregoing, no "confusion" would result regarding the civil cases of the District Court. Given the District Court's policy and the statement of jurisdictional limitation required by 5 V.I.C. Section 5, the

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[6] A preliminary review by the Chief Deputy Clerk of the District Court revealed the following manageable case-load statistics:

ST. THOMAS	CY87	CY88	CY89	CY90
Civil Filed:	474	420	365	422
Civil Closed:	448	653	318	469
Civil Trials:	13	9	11	41

* * * *

ST. CROIX	CY87	CY88	CY89	CY90
Civil Filed:	355	407	272	332
Civil Closed:	312	354	216	194
Civil Trials:	25	16	6	19

* * * *

conclusion is inescapable that very few cases, if any, which fell within the jurisdiction of the Territorial Court were filed in the District Court since January 1, 1977 when the $200,000 jurisdiction was vested in the Territorial Court. 4 V.I.C. Section 76(a). Since the Organic Act Amendment in issue was enacted in 1984, subsequent to January 7, 1977, the statement by the Third Circuit that "hundreds or even thousands" of civil cases would be thrown into confusion is mere speculation and cannot be substantiated by statistics.[7] Moreover, the record is devoid of any factual basis for this alarming statement which obviously served as the basis for the Third Circuit's erroneous interpretation of 48 U.S.C. Section 1612(b), as amended.

Moreover, the issue presented is not the District Court's jurisdiction over civil actions in which the amount in controversy is less than $200,000, but, rather, its jurisdiction over F.E.D. actions, particularly the case at bar. Pursuant to 28 V.I.C. Section 782(b), the Territorial Court has been and continues to be vested with jurisdiction over *all* F.E.D. actions regardless of the amount in controversy or the value of the property. Thus, Act No. 5594, the post amendment legislation increasing civil jurisdiction effective October 1, 1991, provides no increase in jurisdiction with respect to F.E.D. cases. This suggests that the District Court was divested of F.E.D. jurisdiction upon the effective date of the 1984 Amendments. It further suggests that, given the practice in the District Court and existing law, F.E.D. filings in the District Court represent the rare exception rather than the rule. Hence, there could be no "confu-

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[7] The Third Circuit's statement that "no one in the Virgin Islands has read the 1984 Amendment as immediately divesting the District Court of jurisdiction over local actions before now," App. 14a, erroneously implies that this issue had been raised before. In fact, this is an issue of first impression, deserving of the granting of the Writ of Certiorari.

sion" about F.E.D. cases in the District Court if Petitioner's interpretation is accepted.

When viewed in light of the foregoing, it is clear that the Third Circuit's concern about the "confusion" that would result from accepting Petitioner's contention was more imagined than real and the Writ should be granted to allow consideration of this jurisdictional issue which is so significant to the Virgin Islands Judiciary.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ and reverse the decision below.

Respectfully submitted,

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Date: April 10, 1991

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APPENDICES

APPENDIX A

Filed January 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3649 & 3691

ESTATE THOMAS MALL, INC.,
Appellant in No. 90-3691

v.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Appellant in No. 90-3649
Appellant

On Appeal from the District Court
of the Virgin Islands

(D.C. Civil No. 90-00145)

Argued December 5, 1990

BEFORE: HIGGINBOTHAM, *Chief Judge*,
GREENBERG and COWEN, *Circuit Judges*

(Opinion filed January 11, 1991)

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USVI, 00801
Attorney for Appellant Estate Thomas Mall, Inc.

Leon A. Kendall (Argued)
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OPINION OF THE COURT

COWEN, *Circuit Judge.*

This case arises from a dispute between the Territorial Court of the Virgin Islands (the "Territorial Court") as the tenant under a lease and Estate of Thomas Mall, Inc., ("Estate Thomas") the landlord. Since November 29, 1982, the Territorial Court has leased commercial space from Estate Thomas and its predecessor in title.[1] The Territorial Court uses the space to house a youth program known as the "Rising Stars Youth Steel Orchestra." The Territorial Court created the youth group in 1980 as part of a School Drop-out and Delinquency Prevention Program in order to stem the tide of high school drop-outs who went on to become criminal defendants before the Territorial Court. The Rising Stars Youth Steel Orchestra is a magnet to attract youths into the court's Delinquency Prevention Program.

The Territorial Court's lease with Estate Thomas contains a provision which reads: "Landlord shall sup-

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[1] Originally, the Territorial Court rented the property from Vitraco Park, Inc. In November, 1985, Vitraco Park sold the property to Estate Thomas, who accepted assignment of the lease between Vitraco Park and the Territorial Court.

ply water to the bathrooms." Appellant/Cross-Appellee's App. at 139. The bathrooms have showers, sinks, and toilets. From 1982 when the Territorial Court began leasing the premises until 1985 when Estate Thomas purchased the property, Estate Thomas' predecessor in title supplied the premises with potable water. Soon after it purchased the property, Estate Thomas began supplying well water. This arrangement was satisfactory until July, 1989. For reasons not entirely clear from the record, the water Estate Thomas was pumping from the well became contaminated in 1989. After the water became contaminated, it emitted a foul odor and could not be used even to flush toilets, much less for showers.

After testing the water and determining that it was indeed contaminated, the Territorial Court apprised Estate Thomas of the water's condition. Estate Thomas responded in writing that it was unable to correct the problem. In August 1989, the Territorial Court began witholding rent, contending that Estate Thomas was required by the lease to supply useable water.

On January 24, 1990, Estate Thomas filed Civil Action No. 1990-00019 in the District Court seeking collection for back rent and possession of the premises. The Territorial Court filed a Motion to Dismiss on February 13, 1990. That action and the Territorial Court's Motion to Dismiss are currently pending in the District Court.

On June 14, 1990, while the first action was still pending, Estate Thomas filed this case (Civil Action No. 1990-00145) in the District Court. In this action, Estate Thomas seeks possession of the premises under the summary proceedings provided for by the Virgin Islands Forcible Entry and Detainer ("FED") statute, V.I. Code Ann. tit. 28, § 782 (1976).[2] After conducting the sum-

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[2] Section 782 reads:

(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession

mary FED hearing, the District Court entered its Memorandum Opinion and Final Order.

In its Final Order the District Court denied Estate Thomas' application for the FED relief, on the condition that the Territorial Court pay Estate Thomas all rent due through August, 1990. In addition, the District Court ordered Estate Thomas to supply the premises with potable water by September 17, 1990. In the event that the Territorial Court failed to pay rent by September 14, 1990, Estate Thomas had the right to take possession of the premises on October 1, 1990.

The Territorial Court appeals from this order on the grounds that: (1) the District Court lacks subject matter jurisdiction over FED actions because Congress withdrew concurrent jurisdiction from the District Court over local actions; (2) the FED action was barred as a matter of law because the Territorial Court had three years of quiet possession prior to the FED action; (3) the District Court exceeded its authority in awarding Estate Thomas back rent, since (i) that relief was not requested and (ii) such relief is inappropriate in an FED action; and (4) the District Court erred in not dismissing the FED action after it found that Estate Thomas was in breach of the lease agreement.

For its part, Estate Thomas has cross-appealed, contending that: (1) there was insufficient evidence for the

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is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.

(b) If the unpaid rent or the value of the real property does not exceed $500, exclusive of interest and costs, the Territorial Court shall have exclusive jurisdiction of such action. In all other cases, the Territorial Court and the district court shall have concurrent jurisdiction.

V.I. Code Ann. tit. 28, § 782 (1976), as amended by Act No. 8376, § 5, Sess. L. 197 (1975) (providing that "Territorial Court" should be read wherever the V.I. Code prints "Municipal Court").

District Court to find that Estate Thomas was in breach of the lease by failing to supply the premises with potable water; (2) the District Court erred when it admitted written water test results into evidence; and (3) the District Court erred in failing to award Estate Thomas interest on the rent due.

We have jurisdiction to hear this appeal under 28 U.S.C. § 1291. Although we conclude that Congress did not withdraw subject matter jurisdiction from the District Court to hear FED actions, we nevertheless reverse the District Court because Estate Thomas has failed to state a cause of action that is cognizable in forcible entry and detainer. Our decision is based on the conclusion that the Territorial Court is occupying the premises pursuant to a facially bona fide and good faith claim of right. We will therefore remand this case to the District Court with instructions to dismiss.

I.

In 1984, Congress passed an amendment to the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1541, *et. seq.* (1954). The 1984 amendment, P.L. 98-454, eliminates concurrent jurisdiction in the District Court when jurisdiction is vested in the local courts of the Virgin Islands. The amendment has been codified at 48 U.S.C. § 1612(b) and reads in relevant part:

> In addition to the jurisdiction described in subsection (a) of this section [essentially federal question jurisdiction] the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands.

28 U.S.C. § 1612(b) (1987). The threshold question on this appeal is the meaning of the language "not then vested by local law in the local courts." The Territorial Court argues that this language means "not *already*

vested," while Estate Thomas argues that it means "not *hereafter* vested." We must first resolve this question before we can address the other issues raised by this appeal.

The Territorial Court argues that the language "not then vested by local law in the local courts" eliminates jurisdiction over civil actions where the amount in controversy is between $500 and $200,000. Under this argument, jurisdiction in the District Court would be eliminated because V.I. Code Ann. tit. 4, § 76(a) (Supp. 1987) grants the Territorial Court "[o]riginal jurisdiction concurrent with the District Court of all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $200,000." *Id.* Since 28 U.S.C. § 1612(b) limits the general jurisdiction of the District Court to "all causes . . . the jurisdiction over which is not then vested by local law in the local courts," and V.I. Code Ann. tit. 4, § 76(a) vests jurisdiction over civil actions in a local court, the Territorial Court concludes that the District Court lacks jurisdiction over civil actions within the specified range of the amount in controversy.

In addition to eliminating jurisdiction over civil actions where the amount in controversy is between $500 and $200,000, the Territorial Court also asserts that the 1984 amendment to the Revised Organic Act eliminated jurisdiction over FED actions. The argument here is the same as before. The Territorial Court urges that because V.I. Code Ann. tit. 28, § 782 (1976) vests jurisdiction over FED actions in the Territorial Court of the Virgin Islands,[3] jurisdiction over FED actions is vested in a local court. Since 28 U.S.C. § 1612(b) limits the general jurisdiction of the District Court to "all causes . . . the jurisdiction over which is not then vested by local law in the local courts," and V.I. Code Ann. tit.

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[3] *See* footnote 2, *supra* for the text of section 782.

28, § 782 vests jurisdiction over FED actions in a local court, the Territorial Court concludes that the District Court lacks jurisdiction over FED actions.

Lest we be swayed by the fact that the Virgin Islands statutory provisions purport to grant jurisdiction in the District Court, the Territorial Court points out correctly that the Virgin Islands legislature has no power to do that. Only Congress has the power to determine the jurisdiction of the District Court of the Virgin Islands under Article IV of the United States Constitution. Accordingly, we must look only to the language of the Revised Organic Act to determine the scope of the District Court's jurisdiction.

In support of its argument that 28 U.S.C. § 1612(b) eliminates the District Court's concurrent jurisdiction over civil actions generally and FED actions in particular, the Territorial Court points to the "plain language" of section 1612. Section 1612(b) states that there shall be no jurisdiction over actions "the jurisdiction over which is not then vested by local law in the local courts . . . ." Apparently, the Territorial Court would have us read "not then vested" as "not already vested" because according to the Territorial Court, that is what section 1612(b) plainly says.

To bolster the interpretation of section 1612(b) that "not then vested" means "not already vested," the Territorial Court points to section 1612(b)'s legislative history. In its discussion of P.L. 98-454, the Senate stated:

> The purpose of section 22(b) [section 1612(b) as codified] is to eliminate the present situation of both the District Court and the local court having jurisdiction over strictly local causes. *Upon the effective date* the District Court will not [sic] longer have jurisdiction over any cause over which local law has vested jurisdiction in the local courts . . . .

130 Cong. Rec. S. 10527 (August 10, 1984) (emphasis added). The Territorial Court interprets "upon the effective date" to mean "on the effective date *hereof*" and urges that this language supports the conclusion that section 1613(b) meant to say "not already vested" when it actually reads "not then vested." An alternative construction of "upon the effective date" is that it means "upon the effective date of an act by the Virgin Islands legislature divesting the District Court of jurisdiction . . . ." In other words, this portion of the legislative history could mean what the Territorial Court contends (namely that section 1612(b) immediately divested the District Court of jurisdiction over local matters generally, and over FED actions in particular, because jurisdiction over those actions was already vested in a local court). On the other hand, it could mean the exact opposite (namely that section 1612(b) does not by its own force divest the District Court of jurisdiction, but gives the Virgin Islands legislature the power to do exactly that when the legislature chooses to exercise power by vesting a local court with jurisdiction). Because the significance of this portion of the legislative history is unclear, we canot rely on it as a basis for resolving the meaning of "not then vested by local law in a local court."

For its part, Estate Thomas contends that § 1612(b) does not eliminate jurisdiction in the District Court over local actions, but gives the Virgin Islands legislature power to vest jurisdiction over local actions exclusively in local courts. In support of this contention, Estate Thomas cites another section of the 1984 amendment to the Revised Organic Act of the Virgin Islands. This section reads in relevant part:

> The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitu-

> tion and the laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612 (a) [federal question jurisdiction] and (c) [criminal jurisdiction] of this title.

28 U.S.C. § 1611(b) (1987). According to Estate Thomas, the language of section 1611(b) that the legislature "may vest" in local courts jurisdiction over any action over which the District Court does not have exclusive jurisdiction must be read together with section 1612(b). "May vest" looks to the future and so necessarily contemplates an act of the Virgin Islands legislature in the future. In other words, Estate Thomas argues that the Virgin Islands legislature has the power to vest jurisdiction over local matters in local courts under section 1611(b), but it need not do that. Under the reading urged by Estate Thomas, the legislature can choose instead to continue the current system of concurrent jurisdiction in the District Court and the Territorial Court over most civil actions.

We do not agree with Estate Thomas' construction of section 1611(b). We read that section as allowing the Virgin Islands legislature to create territorial jurisdiction for violations of federal law, without divesting the District Court of jurisdiction by operation of section 1612(b). In other words, the Virgin Islands legislature has the power under section 1611(b) to create concurrent federal question jurisdiction in territorial courts. In exercising that power, the legislature will not divest the District Court of jurisdiction under section 1612(b), as it might arguably do if section 1611(b) did not specify that the creation of jurisdiction in local courts over federal questions does not divest the District Court of jurisdiction.

The reason it was necessary to specify that jurisdiction in the District Court would not be destroyed is be-

cause section 1612(b) says that the District Court will not have jurisdiction over actions where jurisdiction is vested by local law in local courts. To avoid an argument that sections 1611(b) and 1612(b) when read together constitute a delegation of power by Congress to the Virgin Islands legislature to create exclusive jurisdiction in Virgin Island courts over questions of federal law, Congress added the last line to section 1611(b) which expressly states the intention of Congress that federal question jurisdiction in local courts, if it exists at all, will be concurrent with federal question jurisdiction in the District Court.

It does not follow from the language of section 1611 that the Virgin Islands legislature is somehow empowered to create exclusive jurisdiction in local courts over local actions by force of the application of section 1611 (b). Section 1611(b) expressly states that "such jurisdiction [i.e. the concurrent jurisdiction of the District Court and the Territorial Court over federal questions where there is no exclusive federal jurisdiction in the district court] shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612(a) [federal question jurisdiction] and (c) [criminal jurisdiction] of this title." We read this last sentence as an acknowledgement that concurrent jurisdiction may exist with respect to federal question jurisdiction and certain criminal actions, but not over local actions which are described in section 1612 (b). The omission of section 1612(b) from the cross reference strongly suggests that Congress did not contemplate District Court concurrent jurisdiction over local actions by operation of section 1611(b), although Congress did contemplate that there would be concurrent jurisdiction over federal questions and certain criminal cases. The question remains whether section 1612(b) divests the District Court of jurisdiction over local actions *ex proprio vigore*, or whether section 1612(b)

contemplates divesture only when the Virgin Islands legislature, after the date of the amendment to the Revised Organic Act, passes a law which vests jurisdiction over local actions in local courts.[4]

In support of the argument that section 1612(b) does not divest the District Court of jurisdiction *ex proprio vigore*, in other words, without the Virgin Islands legislature acting sometime after the effective date of section 1612(b), Estate Thomas points to a different section of the legislative history of P.L. 98-454. In referring to section 22(b) [section 1612(b)], the Senate stated:

> The decision as to whether jurisdiction over strictly local causes should be vested in the district court or the local courts will be made by local law.

130 Cong. Rec. S. 10527 (August 10, 1984). This portion of the legislative history contemplates that the Virgin Islands legislature will have to take some action in the future which divests the District Court of jurisdiction over local matters. As such, it provides strong support for Estate Thomas' contention that the language of section 1612(b) means "vested in local courts after the date of the amendment to the Revised Organic Act." "Not then vested" would mean "not hereafter vested" and so section 1612(b) would not *ex propio vigore* divest the District Court of jurisdiction over local actions.

We are persuaded that this latter argument of Estate Thomas is correct. There is nothing in the language

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[4] "*Ex propio vigore*" means "by its own force." Black's Law Dictionary 522 (5th ed. 1979). It refers to the general principle that some constitutional principles are self-executing. Provisions that are not self-executing require legislation to effectuate their purposes. *See generally Groves v. Slaughter*, 40 U.S. 449 (1841). It is not disputed in this case that the Revised Organic Act of the Virgin Islands, as amended, has the statute of a "Constitution" under Article IV of the United States Constitution. *See* U.S. Const. art. IV, § 3. We therefore must confront the question whether section 1612(b) is self-executing or requires legislation to enact its purposes.

of section 1612(b) that suggests that Congress intended to divest the District Court of jurisdiction over local actions immediately. Surely Congress would have specified that the divesture of jurisdiction was to be immediate if that is what it intended.

Our construction of section 1612(b) is consistent with the view that the Court of Appeals for the Ninth Circuit took when it decided *Agna Bay Develop. Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976). With respect to the Organic Act of Guam, § 22 in former 48 U.S.C.A. § 1424, Congress made a similar provision for divesture of the District Court of Guam where the local legislature vested jurisdiction in a local court.[5] Former section 22 read in relevant part:

> The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, *jurisdiction over which has not been transferred by the legislature to other court or courts established by it. . . .*

Organic Act of Guam, § 22, 48 U.S.C.A. § 1424 (1976) (emphasis added). As in section 1612(b), Congress drafted the divesture provision in a way that could suggest that the divestiture was immediate. Both the former section 22 of the Organic Act of Guam and section 1612(b) contain grammatical inferences which could be construed to mean that divesture was complete upon the enactment of the statute by Congress.

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[5] Former 48 U.S.C. § 1424 (quoted above) was amended in 1978 and again in 1984. The current version of 48 U.S.C. § 1424 (1987) mirrors the language of 48 U.S.C. § 1612. No cases have been decided which construe section 1424, as amended.

Former section 22 of the Organic Act of Guam used the past perfect "has not been transferred" in a way that could suggest "has not already been transferred" just as section 1612(b) inserts the adverb "then" in the phrase "not then vested by local law in local courts" in a way that could be read "not already vested . . . in local courts."

Notwithstanding the fact that former section 22 of the Organic Act of Guam could have been read as having immediately divested the District Court of Guam of jurisdiction over local actions, the Court of Appeals for the Ninth Circuit assumed in *Agna Bay* that the Organic Act did not *ex proprio vigore* divest the District Court of jurisdiction over local matters. Rather, that court assumed that an act of the Guam legislature would be required to divest the District Court of Guam of jurisdiction over local actions. The *Agna Bay* court wrote:

> [A]s to local, non-federal cases, [section 22 of the Organic Act of Guam, 48 U.S.C.A. § 1424] gave the district court original jurisdiction in all 'other causes' *until* the Guam legislature provides otherwise under the power created in the first sentence [of section 22].

Agna Bay, 529 F.2d at 955-56 (emphasis added). We are convinced that we should read section 1612(b) in the same way. Accordingly, we now hold that section 1612(b) does not *ex proprio vigore* divest the District Court of jurisdiction over local matters. Such divestment will not occur until the Virgin Islands legislature enacts a law which effects the power created by the 1984 amendments.[6]

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[6] On August 29, 1990, the Virgin Islands legislature took this action. Local Law No. 5594 amended V.I. Code Ann. tit. 4, § 76 (Supp. 1987) to vest in the Territorial Court jurisdiction over all civil actions regardless of the amount in controversy, effective October 1, 1991. In accordance with out ruling today, this act will divest the District Court of jurisdiction over such actions as of October 1, 1991.

We are not alone in reading section 1612(b) as requiring an act of the Virgin Islands legislature to complete the divesture of jurisdiction in the District Court over local actions. Counsel for both the Territorial Court and Estate Thomas indicated at oral argument that no one in the Virgin Islands has read the 1984 amendment to the Revised Organic Act as immediately divesting the District Court of jurisdiction over local actions before now. Indeed, the District Court has been exercising jurisdiction over civil actions where concurrent jurisdiction is vested by Virgin Islands law in the Territorial Court for the last six years. If we were to accept the Territorial Court's construction of section 1612(b) at this late date, we would throw into confusion hundreds or even thousands of civil actions that the District Court has processed over the last six years. Having resolved the vexatious question of the District Court's jurisdiction, we proceed to the merits.

II.

FED complaints are summary actions to determine rights of peaceable possession of real property. They are a peaceful alternative to the often violent exercise of a property owner's right of self-help. *See C.M.L., Inc. v. Dunagan*, 904 F.2d 189, 190 (3d Cir. 1990). In *Dunagan*, we explained that:

> In exchange for revoking their right to repossession by force, the statute provides a simple summary proceeding, with time requirements substantially shorter than those provided in ordinary civil actions and with the issues sharply restricted.

Id. But speedy adjudication of the issue of peaceable possession comes at a price. The price is that the scope of an FED proceeding is very limited.

> Unless the statute is to the contrary, the jurisdiction of the Court in FED cases is confined to determining

> the issue of peaceable possession and does not extend to (a) an adjudication of title or (b) the right to possession; nor can the justice adjudicate a right of possession that depends on an equitable interest in the premises [ ] or inquire into equitable rights and give relief to which the party might be entitled in equity.

Inter Car Corp. v. Discount Car Rental, 21 V.I. 157, 159 (Terr. Ct. 1984). As soon as a defendant in possession in an FED action raises a colorable defense requiring construction of an agreement between the property owner and the party in possession, an FED action will not lie. *See, e.g., Iron Mountain & H.R. Co. v. Johnson*, 119 U.S. 608, 612 (1887).

In particular, we have held that an FED action is unavailable where the defendant in possession occupies the property under claim of right. *Dunagan*, 904 F.2d at 191 (quoting *Inter Car*, 21 V.I. at 159) ("Where a tenant is retaining possession by force, relief is available in a summary FED proceeding only if there 'is an *undisputed* oral or written lease agreement, and rent is due and owing thereon; or [t]here is an *undisputed* oral or written lease which has expired.' ") (emphasis added). In this case, there is a lease between the parties, the meaning of which is in dispute. In short, the Territorial Court occupies the premises under a claim of right.

While we express no opinion as to the merits of the underlying dispute, it should have been apparent to the District Court that resolution of Estate Thomas' action requires construction of the parties' lease agreement. For instance, the Court would need to construe the lease provision where Estate Thomas agrees to provide water to the bathrooms, determine whether the Territorial Court exceeded its remedies under the lease by withholding rent until Estate Thomas provides useable water, and decide whether the parties have a valid lease at all. While these

may not be the precise issues that will be litigated in an action for rent and ejectment, they are the kind of issues that are appropriately resolved in an ordinary civil action, not the summary FED proceeding.

III.

In conclusion, the 1984 amendments to the Revised Organic Statute did not *ex proprio vigore* divest the District Court of subject matter jurisdiction over local actions generally and FED actions in particular. The District Court had jurisdiction to hear this FED case. The dispute in this case concerns the right and remedies of the Territorial Court and Estate Thomas under their lease. The Territorial Court has come forward with facially good faith and bona fide rights under a lease which, upon trial with plenary review, may defeat the claim of Estate Thomas. As such this controversy is not an appropriate subject for an FED action.

The judgment of the District Court will be reversed and the case is remanded to the District Court with instructions to dismiss the complaint and return all checks or monies held in escrow.[7]

Costs taxed against Estate Thomas Mall in both appeals.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[7] By reason of our determination that, although the District Court had jurisdiction, Estate Thomas was nevertheless not entitled to relief in forcible entry and detainer, we need not resolve the other issues raised on this appeal and cross-appeal.

APPENDIX B

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 1990-145

ESTATE THOMAS MALL, INC.,
Plaintiff,

v.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Defendant.

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JOSEPH J. FARNAN, JR.
United States District Judge
Sitting by Designation

MEMORANDUM OPINION

This is an action for Forcible Entry and Detainer filed on June 14, 1990, by plaintiff, Estate Thomas Mall, Inc. ("Estate Thomas") against the Territorial Court of the Virgin Islands ("Territorial Court").[1] This action arises out of a landlord tenant relationship in which Estate Thomas seeks to recover possession of a rental unit located on St. Thomas at "Vitraco Park."

The Territorial court has filed a motion to dismiss contending (1) this Court lacks jurisdiction over the subject matter; (2) the action is barred by two exemptions to the Virgin Islands' Forcible Entry and Detainer Statute; (3) the plaintiff is estopped from bringing this action because the relief sought in this action is the subject of a pending action before this Court between the same parties; and (4) service of process was insufficient under 28 V.I.C. § 785.

As required by the Virgin Islands Code, Title 28, Section 785, the Court held a hearing on July 13, 1990, to allow defendant to show cause why a judgment of dispossession should not be entered and to hear argument on defendant's motion to dismiss. At the hearing, each party presented evidence in support of their respective positions.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

In 1982, the Territorial Court leased the premises in dispute from the then owner, Vitraco Park, Inc. ("Vitraco"). The Territorial Court converted the leased premises into the headquarters for a School Drop-Out and

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[1] Estate Thomas Mall, Inc. filed an action for breach of contract, declaratory judgment and to recover possession of real property on January 24, 1990 (Civil Action No. 1990-19) which is still pending before the Court.

Delinquency Prevention Program to aid the territory's children. The focal point of the Territorial Court sponsored program was the formation and continued support of a youth steel orchestra named the Rising Stars Steel Band. The Rising Stars used the premises for rehearsals and other activities associated with the band.

On November 21, 1985, Estate Thomas purchased the premises and became the Territorial Court's landlord by accepting assignment of the lease that had existed between Vitraco and the Territorial Court. Since that time there has been one lease extension by agreement of the parties and one option to renew exercised by the Territorial Court.

During the course of its relationship with the Territorial Court, Vitraco had provided potable water for the bathrooms at the unit that were used by the band members. When Estate Thomas became the landlord in 1905, it discontinued providing potable water and it was that act that has led to the ongoing dispute between Estate Thomas and the Territorial Court with regard to the leased premises. As a result of Estate Thomas ceasing to supply potable water to the bathrooms of the leased unit, the Territorial Court began to withhold its $3,000 per month rent in August of 1989. Since August of 1989, the Territorial Court has continued to withhold its monthly rent in an effort to force Estate Thomas to supply potable water.

The Territorial Court has not placed the withheld trusts in escrow, although on December 5, 1989, it did offer to have Estate Thomas' counsel hold the rents in escrow pending resolution of the water dispute. Estate Thomas, however, would not agree to the procedure. During the period it has withheld rent, the Territorial Court has not purchased any potable water for use in the bathrooms or undertaken any other reasonable self-help remedies.

Prior to withholding its rent, the Territorial Court did give written and oral notice of its contention that Estate Thomas was responsible to provide potable water to the unit.[2]

The lease between the parties dated November 29, 1982, provides in *Paragraph 5—Utilities* that the "landlord shall supply water to the bathrooms." [3]

Further, in *Paragraph 16—Default*, the lease provides:

> In the event of any breach of any of the covenants and agreements on the part of Landlord to be performed and not corrected within ten (10) days after notice thereon by Tenant to Landlord, then Tenant may at its option correct the breach at its own expense and deduct the total thereof from any rents due or to become due.

On May 16, 1990, and May 29, 1990, Estate Thomas hand-delivered Notices of Default and to Quit to the Territorial Court citing the non-payment of rent.

CONCLUSIONS OF LAW

1. *Defendant's Motion to Dismiss*

a. Subject Matter Jurisdiction.

The Court concludes that it has jurisdiction over Forcible Entry and Detainer actions pursuant to 28 V.I. § 782(b).

b. Legal Bar to Action.

The Court concludes that 28 V.I.C. § 793 is not a bar to this action. Section 793 requires that possession must

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[2] See July 5, 1989 letter from Leon Kendall, General Counsel for the Territorial Court, to Drew Johnson, Estate Thomas' representative.

[3] At the conclusion of the hearing on July 13, 1990, the Court instructed the parties to submit estimates of the cost of supplying potable water to the leased premises.

be "three years' quiet possession of the premises immediately proceeding the commencement of such action". Since the Territorial Court's possession of the leased premises has been disputed since at least August 1989, as demonstrated by the Territorial Court's own evidence, the Court concludes that quiet and continuous possession has not been established.

c. Estoppel.

The Court concludes that plaintiff is not estopped from commencing this action because of the pendency of Civil Action No. 1990-19, since the actions are distinguishable by their nature and the principal relief sought.

The Court of Appeals for the Third Circuit in discussing the principles and remedies to be utilized by district courts when it appears two possibly duplicative actions are pending on its docket stated:

> . . . the district court carefully insures that the plaintiff does not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed. 563 F.2d 60.

The Court concludes that the two actions at issue are not substantially identical.

Civil Action 1990-19 contains four counts and is principally a breach of contract suit for recovery of rent. As further relief, it also seeks a declaration of the respective rights of the parties under their written lease agreement. In its final count (Count IV), plaintiffs seek possession of the property as an adjunct to their anticipated success on all other counts of the lawsuit.

Civil Action 1990-145 is a summary action for possession only premised on the alleged failure of defendant to pay rents when due for almost one year.

The Court concludes that plaintiff's bringing the second action did not enhance its procedural rights, except as those rights may pertain to a timely disposition of litigation by the Court.

d. Sufficiency of Service of Process.

The Court concludes that service of process in this action was sufficient and in compliance with 28 V.I.C. § 785.

Title 28, V.I.C., § 785 provides that upon filing a complaint, a summons shall be served and returned within 3 days. The record demonstrates that plaintiff fully complied with its obligations to obtain timely service on defendant, and the time gap that did occur in this action did not prejudice defendant.

2. *Substantive Issues*

a. The Landlord's Obligation.

The Court concludes that Paragraph 5 of the November 29, 1982 lease between the parties and the course of conduct between Vitraco and the Territorial Court in carrying out the terms of the lease require that the landlord, Estate Thomas, provide potable water for use in the bathrooms. Therefore, the Court concludes that plaintiff defaulted on its obligations under the lease.

b. The Tenant's Remedies.

The Court concludes that Paragraph 16 of the November 29, 1982 lease between the parties allows defendant to cure defaults by plaintiff by deducting the cost of correcting the breach from its rent. Therefore, the Court concludes defendant was entitled to apply its rent, after notice of the default to plaintiff, to compensate for the reasonable cost of supplying potable water to the leased premises for use in the bathrooms.

The Court further concludes that defendant's withholding of the full rent each month ($3,000) has exceeded its remedies under the lease.[4]

c. Defendant's Showing of Cause in Response to Allegation of Unlawful Holding by Force.

The Court concludes that although the Territorial Court withheld an amount in excess of what is reasonable to cure Estate Thomas' default, it is entitled to remain in possession of the premises under the terms of the parties' lease. In that regard, if Estate Thomas does not supply reasonable amounts of potable water, the Territorial Court shall deduct the reasonable costs of supplying potable water from its monthly rent.

With regard to the rent that the Territorial Court has withheld since August 1989, the Court concludes Estate Thomas is entitled to receive the entire withheld amount, since the Territorial Court did not incur any expenses in supplying water itself.

An appropriate Order has been entered.

DATED this 5th day of September, 1990.

/s/ Joseph J. Farnan Jr.
United States District Judge
Sitting by Designation

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[4] The defendant has contended that pursuant to statute it was permitted the remedy of rent withholding and not regulated to exercise its self-help remedy under Paragraph 16. Even if plaintiff is correct with regard to its right to withhold, the Court concludes that defendant's failure to maintain an appropriate escrow arrangement as required when a withholding is undertaken has resulted in defendant's efforts having no legal effect with regard to plaintiff's present claims.

APPENDIX C

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Action No. 1990-145

ESTATE THOMAS MALL, INC.,
Plaintiff,

v.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Defendants.

FINAL ORDER

WHEREAS, in accordance with the Court's Findings of Fact and Conclusions of Law to be filed on September 4, 1990,

IT IS HEREBY ORDERED this 31st day of August, 1990, that:

1. Defendant's Motion to Dismiss is denied.

2. Plaintiff's application for Forcible Entry and Possession of the leased premises is denied on the condition that defendant pay all rent due through August 1990 ($36,000.00) to plaintiff no later than September 14, 1990. If defendant fails to pay plaintiff the amount due by said date, plaintiff may take possession of said leased premises on October 1, 1990.

3. Effective September 17, 1990, plaintiff shall supply to defendant in a manner determined by plaintiff, potable water at the leased premises. Said supply shall be

in amounts sufficient to meet defendant's reasonable requirements. If the parties cannot agree on the manner and amount of water to be supplied, they shall advise the Court of their respective positions no later than September 10, 1990.

/s/ Joseph J. Farnan Jr.
United States District Judge
Sitting by Designation

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3649 & 90-3691

ESTATE THOMAS MALL, INC.,
Appellant in No. 90-3691

vs.

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Appellant in No. 90-3649

(D.C. Civil No. 90-00145)
On Appeal from the United States District Court
of the Virgin Islands
(Division of St. Thomas and St. John)

Present: HIGGINBOTHAM, *Chief Judge*, GREENBERG and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court of the Virgin Islands, Division of St. Thomas and St. John and was argued by counsel December 5, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 6, 1990, be, and the same is hereby reversed and the cause is remanded to

the said District Court with instruction to dismiss the complaint and return all checks or monies held in escrow. Costs taxed against Estate Thomas Mall in both appeals. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

January 11, 1991

Certified as a true copy and issued in lieu of a formal mandate on March 4, 1991.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit

APPENDIX E

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, Section 3, Clause 2 of the Constitution of the United States provides, in part, that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

Section 22 of the Revised Organic Act of 1954, 48 U.S.C. Section 1612, provides, in pertinent part:

> JURISDICTION OF DISTRICT COURT
>
> * * * *
>
> "(b) In addition to the jurisdiction described in subsection (a) the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands . . ."

Section 76 of Title 4 of the Virgin Islands Code, provides, in pertinent part:

> CONCURRENT JURISDICTION
>
> "(a) The territorial court shall have original jurisdiction concurrent with that of the district court in all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $200,000 . . ."

Section 782 of Title 28 of the Virgin Islands Code, provides:

> ACTION FOR FORCIBLE ENTRY OR DETAINER
>
> "(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession is held by force, the person en-

titled to the premises may maintain an action to recover the possession thereof.

(b) if the unpaid rent or the value of the real property involved does not exceed $500, exclusive of interest and costs, the municipal court shall have exclusive jurisdiction of such action. In all other cases, the municipal court and the district court shall have concurrent jurisdiction."